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Appendix A 1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 580

WILLIAM T. GRAHAM and GRAHAM PLOW, INC.,

Petitioners,

v.

JOHN DEERE COMPANY OF KANSAS CITY and DEERE & COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NEW YORK PATENT LAW ASSOCIATION AS *AMICUS CURIAE*

The New York Patent Law Association files this brief as *amicus curiae* pursuant to Rule 42(2). (See concurrently filed letters of consent of the parties.)

The New York Patent Law Association is an association of approximately 1100 practicing lawyers whose primary interest is in the field of patent law. It has a vital and continuing interest in the administration of the Patent Law (United States Code Title 35); and is cognizant of the widespread public and commercial interest in the basic legal issue and related fundamental juridical question

underlying the resolution of the controversy presented by the particular question phrased by the parties hereto, i.e., the validity of United States Patent No. 2,627,798.

This association has no interest in and takes no position with respect to the validity or invalidity of United States Patent No. 2,627,798 but will direct itself entirely to the more fundamental issue of the nature of the applicable conditions and requirements for patentability of inventions upon which the question of validity of patents must ultimately be determined.

Argument

The basic question before this Court is succinctly posed by the following extract from the decision of the Court of Appeals for the Eighth Circuit in its opinion below:

> "Here, the trial court couched its Finding XV rather precisely in the statutory standard of invention found in 35 U. S. C. § 103, and found that the 798 Patent structure would not have been obvious at the time it was made to a person having ordinary skill in the art. But, other findings of the court lay stress on 'an *improved* functional result,' and nowhere does the court find any new or significantly different result. Seemingly, the trial court failed to apply the more exacting standard which in our view is implicit in the teachings of the Supreme Court in Cuno Engineering Corporation, supra, 314 U. S. 84, 51 USPQ 272, and Great A. & P. Tea Co., supra, 340 U. S. 147, 87 USPQ 303, and which we have applied in numerous cases subsequent thereto" (333 F. 2d 529 at 534).

The basic question so posed is whether the federal courts may add conditions for patentability to those enunciated by Congress in Title 35 of the United States Code. It is

the view of our association that the federal courts cannot properly do so.

Article 1, Section 8 of the Constitution of the United States states:

> "The Congress shall have power
>
> • • • • •
>
> "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:"

Under such power Congress has plenary authority to enact all laws consistent with the specified purpose of promoting *"the progress of science and useful arts"**, and which, in its judgment, will be best calculated to effect that object. In *United States* v. *Duell,* 172 U. S. 576, 583 (1898), this Court said:

> "Since, under the Constitution, Congress has power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' and to make all laws which shall be necessary and proper for carrying that expressed power into execution, it follows that Congress may provide such instrumentalities in respect of securing to inventors the exclusive right to their discoveries *as in its judgment will be best calculated to effect that object.*"

Pursuant to such enumerated power Congress has many times since 1790** enacted legislation in the patent field. See *Deller's Walker on Patents* (2nd Ed.), Vol. 3, pages 197 *et seq.* Despite such continued Congressional scrutiny

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* Emphasis hereafter ours unless otherwise noted.

** The original patent act of 1790 was titled "An Act to Promote the Progress of Useful Arts".

and activity, the peculiar fact is that none of the statutes enacted by Congress prior to the passage of the 1952 Patent Act ever attempted to define or delineate any statutory requirements or conditions for patentability other than novelty and utility.*

Within the statutory framework that existed before the 1952 Act, the federal courts were unrestrained by Congress and were free to resolve, on a case by case basis, the question of whether patentability required something more than novelty and utility and, if so, the nature of that "something more".

The judicial delineation of such additional requirement for patentability had its genesis in *Hotchkiss* v. *Greenwood*, 52 U. S. (11 How.) 248 (1850). That decision phrased a requirement of the "something more" than novelty and utility in terms of the presence of a "degree of skill and ingenuity which constitute essential elements of every invention" as follows:

> "* * * for unless more ingenuity and skill in applying the old method * * * were required than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skilful mechanic, not that of the inventor" (52 U. S. at 266).

The reasoning of this case and what followed after it was an injection into the law of what has ever since been called a requirement for "invention". Generally, this Court

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* See, e.g., Edwards, *Efforts To Establish A Statutory Standard Of Invention*, Study No. 7, Subcomm. on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 85th Cong., 1st Sess. 1-2 (Comm. Print 1958); Frost, *The Patent System And The Modern Economy*, Study No. 2, Subcomm. on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 84th Cong., 2nd Sess. 47-60 (Comm. Print 1957).

applied this requirement of "invention", albeit with verbal variants, during the ensuing years. See, e.g., *Dunbar* v. *Meyers,* 94 U. S. 187, 197-200 (1876); *McClain* v. *Ortmayer,* 141 U. S. 419, 425-29 (1891); *Expanded Metal Co.* v. *Bradford,* 214 U. S. 366, 381 (1908); *Eibel Process Co.* v. *Minn. & Ontario Paper Co.,* 261 U. S. 45, 63 (1923). Other verbal variants made their appearance and were such as to be later readily arguable as representing marked departures from the *Hotchkiss* v. *Greenwood* requirement. See, *Smith* v. *Whitman Saddle Company,* 148 U. S. 674, 681 (1893); *Potts* v. *Creager,* 155 U. S. 597, 607 (1894); *Mantle Lamp Co.* v. *Aluminum Products Co.,* 301 U. S. 544, 546 (1936).

In the more recent years prior to 1952, the terminology and associated comments employed by this Court relative to the delineation of the requirement of "invention" elevated them into "standards" which differed from those of earlier cases. See *Lincoln Co.* v. *Stewart Warner Corp.,* 303 U. S. 545, 549 (1938); *Cuno Engineering Corp.* v. *Automatic Devices Corp.,* 314 U. S. 84, 91 (1941). Such terminology, coupled with the associated comments in *Great A. & P. Tea Co.* v. *Supermarket Corp.,* 340 U. S. 147 (1950), created serious questions as to uniformity and definiteness of the requirements for patentable invention in the lower courts and, more importantly, as to whether the requirements or standards of "invention" were being judicially raised to a level that would impede, rather than promote, the progress of useful arts.

The cumulative effect of the above, when viewed in light of the increased proportion of patents that were being held invalid on reaching this Court, was the creation of a situation that could be described as basically unstable and unworkable and which led to pointed commentaries by members of this Court over the role of the judiciary in the patent system. See, *Jungersen* v. *Ostby & Barton Co.,* 335 U. S. 560, 568, 571-2 (1949).

At least in partial response to the above development, Congress, in the late 1940's, considered the enactment of

a statutorily defined requirement or standard of "invention".* These efforts resulted in the enactment of the 1952 Act containing §§ 101, 102 and 103 of Title 35 of the United States Code with which the Court is presently concerned.

As noted in both the Senate and House Reports on the subject legislation, "Section 101 sets forth the subject matter that can be patented, 'subject to the conditions and requirements of this title.' The conditions under which a patent may be obtained follow, and Section 102 covers the condition relating to novelty."** Section 102 significantly uses mandatory language—"A person shall be entitled to a patent unless * * *" and this is followed by an enumeration of negative conditions.

The Senate and House Reports also state:

> "There are a number of changes in substantive statutory law * * *. The major changes or innovations in the title consist of incorporating a requirement for invention in § 103 * * *."***

With respect to § 103, the Reports state:

> "Section 103, for the first time in our statute, provides a condition which exists in the law and has existed for more than 100 years, but only by reason of decisions of the courts. An invention which has been made, and which is new in the sense that the same thing has not been made before, may still not be patentable if the difference between the new thing and what was known before is not considered sufficiently great to warrant a patent. That has been expressed in a large variety of ways in decisions of the Courts and in writings. Sec. 103 states this requirement in the

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* See Edwards, *supra* footnote, page 4 at 2-15.

** S. Rep. No. 1979, 82nd Cong., 2nd Sess. 5 (1952); H. R. Rep. No. 1923, 82nd Cong., 2nd Sess. 6 (1952).

*** *Id.*, S. Rep. at 4; H. R. Rep. at 5.

title. It refers to the difference between the subject matter sought to be patented and the prior art, meaning what was known before as described in section 102. If this difference is such that the subject matter as a whole would have been obvious at the time to a person skilled in the art, then the subject matter cannot be patented."*

As to the intent and purpose of Congress, the Reports continue:

"That provision paraphrases language which has often been used in decisions of the Courts, and the section is added to the statute for uniformity and definiteness. This section should have a stabilizing effect and minimize great departures which have appeared in some cases."**

The exclusive nature of the Congressionally selected standard of patentability or "invention" as defined in § 103 is confirmed by the express wording of § 282 which enumerates the defenses available in patent actions.

Thus, Congress has, in the Patent Act of 1952, for the first time defined the statutory requirement for, and standard of, "invention" as one of the "conditions for patentability".

The public interest is dominant in the patent system. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 665 (1944). But the legislature is the prime guardian of the public interest. This was recognized in *Berman* v. *Parker*, 348 U. S. 26 at 32 (1957):

"* * * Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. * * *."***

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* *Id.*, S. Rep. at 6; H. R. Rep. at 5.
** *Id.*, S. Rep. at 6; H. R. Rep. at 5.
*** Cf. *Local 1976* v. *NLRB*, 357 U. S. 93, 100 (1958).

It is settled law, both as a general proposition and with respect to other enumerated powers of Congress, that where Congress has acted, judicial power is effectively limited to the determination of whether the legislature, in what it has prescribed, has gone beyond constitutional limits. In this determination the Court is not concerned whether the action taken was wise or expedient. *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 1, 196-7 (1824); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 46 (1936); *Helvering* v. *Davis,* 301 U. S. 619, 640 (1937); *Guaranty Trust Co.* v. *Henwood,* 307 U. S. 247, 259 (1939); *Polish Alliance* v. *NLRB,* 322 U. S. 643, 650-1 (1944); *United States* v. *Twin City Power Co.,* 350 U. S. 222, 224 (1956); *Railway Employe's Dept.* v. *Hanson,* 351 U. S. 225, 234 (1956); *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, 214-5 (1962).* It is also recognized that the judicial power does not extend to engraftment to, or superimposition on, legislative action. *Dewey* v. *United States,* 178 U. S. 510, 520-1 (1900); *Electric Battery Co.* v. *Shimadzu,* 307 U. S. 5, 14 (1939); *United States* v. *American Union Transport, Inc.,* 327 U. S. 434, 456-7 (1946).

By its enactment of § 103, Congress has pre-emptively defined a statutory requirement of "invention" expressed as a condition for patentability to the effect that a patent may *not* be obtained:

> "* * * if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains * * *."

The exclusivity of such condition for patentability is further emphasized by the concluding sentence of the section

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* See *United States* v. *Darby,* 312 U. S. 100, 115-6 (1940); *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U. S. 604, 618, 619 (1950); *FTC* v. *Simplicity Pattern Co.,* 360 U. S. 55, 67-8 (1959); *Barenblatt* v. *United States,* 360 U. S. 109, 132 (1959).

and the Revision Notes which express a Congressional negation of certain previously enunciated judicial criteria,* as follows:

> "Patentability shall not be negatived by the manner in which the invention was made."

The Revision Note states:**

> "The second sentence states that patentability as to this requirement is not to be negatived by the manner in which the invention was made, that is, it is immaterial whether it resulted from long toil and experimentation or from a flash of genius."

In the light of the foregoing, we submit that the passage of the 1952 Patent Act so circumscribed the power of the federal courts as to preclude their enunciation of any additional conditions for patentability or standards of "invention" and effectively limited the function of such courts to the application of the Congressionally enacted standard.

In the recent case of *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 231 (1964), this Court, per Mr. Justice Black, again recognized that under the Constitution it is Congress that determines the national policy with respect to patents and that such policy should be applied uniformly throughout this country. The condition for, or standard of, patentability as defined in Section 103 should be uniformly applied by the federal courts sitting throughout this country.

As recently pointed out by Judge Giles S. Rich of the United States Court of Customs and Patent Appeals, one of the major problems in the administration of Section 103 is a confusion of terminology and meaning which had grown up over the past 100 years. As Judge Rich clearly

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* Cf. *Cuno Engineering Corp.* v. *Automatic Devices*, 314 U. S. 84 (1941).

** U. S. Cong. & Adm. News 1952, page 2411.

pointed out, the basic issue is one of "patentability" and not one of "invention". We recommend to this Court's attention the recent address of Judge Rich, annexed hereto as Appendix A, in which he reviews the historical background, the reasons for the enactment of Section 103 of the 1952 Act and the problems attendant its administration.

CONCLUSION

Since the passage of the 1952 Patent Act the conditions for patentability have been exclusively defined by statute and it has been the function of the federal courts to ascertain whether such conditions have been satisfied. In the case at bar, the Court should determine the validity of patent 2,627,798 by applying to the facts of record the conditions for patentability set forth in the 1952 Patent Act.

Respectfully submitted,

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APPENDIX A

KETTERING AWARD ADDRESS

The Vague Concept Of "Invention" As Replaced By § 103 Of The 1952 Patent Act

JUDGE GILES S. RICH

An address delivered* by Giles S. Rich, Judge of the United States Court of Customs and Patent Appeals, at the Award Dinner of the Eighth Annual Public Conference of The Patent, Trademark and Copyright Research Institute on June 18, 1964. Judge Rich received the Institute's seventh annual "Charles F. Kettering Award for Meritorious work in Patent, Trademark, and Copyright Research and Education."

I believe in incentive systems. Over 20 years ago a prize competition lured me into some intense study and writing[1] which, through a traceable chain of events, has led to my being here tonight.

I did not win the prize. Neither did the other contestants, save one.[2] But they all contributed something. That is the way incentive systems work. They bring out all kinds of efforts, excellent, good, mediocre, indifferent, and bad. But the *system* brings forth the effort. Society benefits from the good and mediocre, as well as the excellent, efforts. The bad efforts don't hurt it any. They may even prevent others from making mistakes if they are made known.

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* Published in 46 Journal of the Patent Office Society 855 (December 1964).

[1] The Linthicum Foundation Competition, 1941, Dean John H. Wigmore, Northwestern University Law School, Chairman. The writer's contribution was published in five installments in the *Journal of The Patent Office Society*, Vol. 24, pp. 85, 159, 241, 328, and 422, commencing Feb. 1942.

[2] The winner was Laurence I. Wood whose paper was published in book form, 1942, by Commerce Clearing House, Inc., under the title *Patents and Antitrust Law.*

Appendix A

The patent and copyright laws create such incentive systems. The copyright laws provide an incentive which brings out the greatest works of literature and art as well as a lot of trash. The patent system works in a similar way. But you can't get cream without producing milk and, anyway, it is the milk that society lives on.

I don't suppose you will be surprised if I talk about the patent system. The aspect of it I will talk about is the one I think causes the most trouble, the clarification of which I therefore believe would do the most good.

As groundwork I will first state an axiomatic but too-little-thought-of principle. A monopoly merely gives rise to *power* which can be put to either good or bad uses. Hence, in the case of monopolies created by government grant, which is all patents are so far as the rights they create are concerned,[3] we have to distinguish between good and bad monopolies.

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[3] Dean Wigmore, n. 1, in his foreword to the Wood book, n. 2, said:

> * * * I take the opportunity to intrude my personal opinion, that neither Courts nor treatise-writers have been radical enough in defending the legitimacy of the "monopoly" in a patent, as distinguished from the ordinary trade-monopoly. Is it not a fact that every property-right we have is a "monopoly"? The right to our house or our automobile is simply a right to keep anyone else from entering or using it without our consent; and is that not a monopoly?
>
> * * *
>
> Of course patent-rights can be so *used* as to merit the distrust attaching to a monopoly,—by contracts fixing prices, by tying agreements, by pools and the like. But so can gold-mines and all the necessities of life by bargains be used monopolistically; yet no one blames the mine-owning right itself or the food-ownership right itself; the blame is directed to the use of it.
>
> And so I for one regard it as unfortunate that courts and treatise-writers have not stood up more boldly for the fundamental right-ness of the patent right itself. I say "for one", because I do not recall reading anywhere an adequate defense of the theory of the patent-right.

Appendix A

I will take two well-known examples from history. First, the bad monopoly. Queen Elizabeth granted to one Darcy, a member of her court, a monopoly of playing-cards for 21 years so that he could make some money. But playing-cards were old and well-known and others were making a living from making and selling them in England. This monopoly, which was by Royal Letters Patent, therefore took from the public a freedom in business which it had long enjoyed before the patent; and it was bad.[4]

In Venice in 1594 the Doge, on behalf of the government, granted to the great Galileo a "privilege," which was the Venetian name for a patent, on a machine which he had *invented* "for raising water and irrigating land with small expense and great convenience," on the condition that it had never before been thought of or made by others.

Galileo made a couple of significant remarks in his petition for the privilege. He said, "it not being fit that this invention, which is my own, discovered by me with great labor and expense, be made the common property of everyone;" and also, that if he were granted the privilege, "I shall the more attentively apply myself to new inventions for universal benefit." In short, he was not inclined to divulge his invention only to have it copied; but if the government would give him some reasonable protection he would not only divulge it and build it but might even apply himself to making some more inventions. Deeming this to be a *good* use to which to put a limited monopoly, the Council voted to grant him a "privilege" or patent of monopoly for 21 years.[5]

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[4] Darcy v. Allin, 11 Co. Rep. 846: 1 W.P.C. 1. See *Monopolies and Patents* by Harold G. Fox, U. of Toronto Press, 1947, p. 318. The case also has the popular title "The Case of Monopolies."

[5] *Journal of the Patent Office Society,* Centennial Number, "History of the Patent Office," July 1936, Vol. 18, p. 23.

The Venetians were accustomed to doing this, having granted about 1600 "privileges" in the 15th and 16th centuries.[6]

The English in 1624 enacted a statute[7] abolishing and prohibiting future monopolies of the bad Darcy sort and authorizing the continuing grant of Letters Patent for new inventions within the realm, which has continued to this day.

The founding fathers came to America from the mother country, bringing with them knowledge of this practice of granting monopolies. In the nearly 150 years of the colonial period preceding the Federal Constitution, the colonies and then the States granted numerous patents for new inventions as well as monopolies to encourage the founding of new industries, including, as the English did, encouragement of setting up in America industries already practiced abroad.[8]

It is not surprising that, when it came to the writing of a Constitution, provision should be incorporated, with no controversy at all, for Congress to make laws for the granting of patents to inventors, or that George Washington should urge its speedy enactment, or that the very first Congress should enact our first Patent Act of 1790.[9]

Then began our patent system. One might describe it as a great experiment which goes on continuously, getting more complex all the time, in which this Institute is playing, for the first time, a vital roll in finding out how the system actually works, as an aid to preserving its basic principles and saving the obvious good that is in it.

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[6] *Id.* Most of the privileges were for copyrights but a small percentage were for inventions.

[7] The Statute of Monopolies, May 25, 1624, 21 Jac. I, c. 3. For its history see Fox, *supra*, n. 4, Chap. IX, pp. 113-126.

[8] See *JPOS*, *supra*, n. 5, pp. 35-58.

[9] *Id.* pp. 55-62.

Appendix A

In this experiment, which involves a mixture of economics, law, technology, and psychology, we still have the centuries-old problem of monopoly power being utilized for socially good and socially bad ends and of deciding which is which.

The greedy nature of some men is such that there are always pressures toward the creation of bad monopolies. Undue preoccupation with countering this pressure, however, has quite blurred the vision of many well-intentioned but not too well-informed people to the good uses monopoly can be put to and to the good that monopoly power can do, properly channeled and not so proscribed as to lose its effective power.

Paradoxically, in the working of the patent system, monopoly often promotes competition. Numerous instances are all around us, wherever two products serving the same general purpose have achieved, with the aid of patent protection, commercial production. And only after such production is there any possibility of market competition.

To this point I have taken note that the ***primary*** distinction between good and bad patent monopolies is that the good patent does not monopolize something the public *already has,* so as to take something away from the public. The invention covered by the good patent must be ***new;*** and so our statutes have always provided, though the provision was not always enforced.[10]

But beyond bare novelty one must go one further and troublesome step to have a sound system and keep the monopoly on the good side.

As we refrain from granting patents on inventions that are not new, we must also refrain from granting patents on those inventions which would arise *spontaneously,* given

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[10] *Id.* pp. 77-82, 230. Under the 1793 Act, for example, there was no examination for novelty over a period of 43 years. About 10,000 patents issued under that act for terms of 14 years, less than the number issued today in 3 months.

the need or the desire for them, as the yelp of the dog surely follows from stepping on his tail, or with *only a nominal expenditure of time, effort, money or wit*—especially if the invention is one of real utility likely to meet with popular demand.

It was not long after the Patent Act of 1836—in 1850 in fact—that the United States Supreme Court made this clear in the "doorknob case" *Hotchkiss* v. *Greenwood.*[11] What was involved was the trial judge's charge to a jury that if *no more ingenuity or skill was required* to construct the patented doorknob *than was possessed by an ordinary mechanic acquainted with the business,* then the patent was invalid.

The Supreme Court approved the charge. The opinion said: "In other words, the improvement is *the work of the skilled mechanic, not that of the inventor.*" (My emphasis.) The decision made clear that patents are not to be granted on inventions which are no more than what the ordinary mechanic acquainted with the business would produce as a matter of course in the pursuit of his calling. Such mechanics are expected to produce *new* things, such as were involved in that case, which was the attaching of an old clay doorknob to an old metal shank in precisely the same manner that metal doorknobs had been attached to such shanks before. Technically the assembly was *new*, but the court found novelty was not enough.

In referring to "mechanics" in this matter we can take them to be representative of a class—all those with ordinary skill in the various callings, ordinary shoemakers, ordinary chemists, electronic technicians of ordinary skill, etc.

Due to the reasoning of the case, that the new doorknob "was the work of the skillful mechanic, not that of the inventor," what came out of it after 1850, and is still with

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[11] 52 U.S. 248.

us, was an injection into the law of what has ever since been called the "requirement for invention."

As is usual with a "doctrine" derived from a court opinion, the doctrine persists while the facts out of which it arose are forgotten. The opinion in the first case is quoted to the judge in a second and he does an opinion embroidering on it, his words being quoted in turn and reembroidered and so on.

I think the resulting situation with respect to the law on the "requirement for invention" was well summed up by Judge Learned Hand, who knew as much patent law as any judge ever has, at a Senate hearing in which your then Dean Colclough and I both participated in 1955, as follows:

"You could find nearly anything you liked if you went to the opinions. It was a subject on which judges loved to be rhetorical. * * * patent lawyers * * * like to quote all those things. There are lots of them."[12]

This proliferation of views on what did and did not amount to "invention" went on for 100 years. We were enlightened with the view that "invention" resulted from the exercise of the "inventive faculties" and other circular reasoning. Our present standard text, Walker, now in its seventh edition, says "An invention is the result of an inventive act."[13] Whole books on the patent law were written around such concepts. People collected the statements pro and con in volumes equally divided about in the middle—"invention" on one side, lack of it on the other. Negative and positive tests for detecting its presence evolved. So did exceptions to each test. And patent lawyers selectively quoted all of this mass of material as though it proved something. Judges like Learned Hand found,

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[12] Hearings pursuant to S. Res. 92, 84th Cong., 1st Sess., on the American Patent System, Oct. 10-12, 1955, p. 113.

[13] Walker on Patents, Deller Ed., Vol. 1, p. 110.

in his words, that "They never seemed to tend toward enlightenment."[14]

This requirement finally evolved into a "*standard* of invention" which the courts pretended was being raised and lowered like an elevator as though it were something tangible. They also proclaimed in all seriousness—and are doing so this very summer—that this "standard" was to be found in the Constitution, where there are only two words on which it could possibly be predicated, the word "inventors" and the word "discoveries."[14a] You really have to be on the Supreme Court to find out a "standard" there because the only way it works is this: if you think the lower court was wrong in sustaining the patent, you proclaim that it applied too low a standard and reverse its decision.[15]

Some judges got it fixed in their minds that if a thing is an "invention" then it is patentable and if it is not patentable then it is not an "invention," not realizing that the same things are invented over and over—by the use of the inventive faculties or by inventive acts or what have you—and although clearly "inventions," their originators being as firmly convinced of it as was Galileo, they are not patentable for want of novelty. So it is customary for

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[14] Hearings, n. 12 *supra*, p. 113.

[14a] I am not unaware of the statement of the *objective* in Art. I, sec. 8, clause 8, "To promote the progress of * * * useful arts." See "Principles of Patentability," 28 *Geo. Wash. L. Rev.* 393. When Congress exercised its power under that clause and set up a patent system, so long as the *system as a whole* functions to further the Constitutional objective, it would not seem that the statement of the objective could set any "standard" for patentability of any single invention.

[15] See Great Atlantic & Pacific Tea Co., v. Supermarket Equipment Corp., 340 U. S. 147, 87 *USPQ* 303 (1950), where the two concurring opinions below were held to have applied a "standard of invention * * * that is less exacting than that required * * *."

judges to approach all inventions gingerly in their opinions by referring to the, as "alleged" or "supposed" inventions.

All an invention is, however, is something which has been found out, or devised, or discovered. The question today is not what to call it but whether under the statute it is patentable. Hundreds of "real" or "true" inventions, all resulting from "inventive acts" and the exercise of the "inventive faculties," are held unpatentable every day for lack of novelty.

The Patent Office, of course, proceeded on the same basis, and still does so to a dwindling extent, rejecting applications for want of "invention" and granting them when it could be persuaded that "invention" was present. And through it all the patent lawyers and the judges persisted in telling all concerned that "invention" was something which could not be defined, like God! Patent validity came as a matter of grace, from on high. This was a messy state of affairs. The surprising thing is it worked so well. But not well enough.

In 1941 a Commission, appointed by President Roosevelt, and headed by Charles F. Kettering,[16] came out with a report which said:

"One of the greatest technical weaknesses of the patent system is the lack of a definitive yardstick as to *what is invention.* To provide such a yardstick and to assure that the various courts of law and the Patent Office *shall use the same standards,* several changes are suggested. It is proposed that Congress shall declare a national standard whereby [mark these words] *patentability* of *an* invention

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[16] For a note on who Kettering was and his prolific accomplishments in the fields of business, research and inventing, see "The Kettering Archives" by Eugene B. Jackson, 44 *Jour. Pat. Office Soc.* 331, May 1964.

shall be determined by the objective test as to its advancement of the arts and sciences." [My emphasis.][17]

One apparent thought there was to stop talking about whether a thing is or is not an "invention," to take anything presented as *an* invention, and then to determine its *patentability* according to a standard which Congress was to declare, Congress never having said anything about it up to that time.

For some years nothing came of the Kettering Commission proposal but in the 79th, 80th, and 81st Congresses, from 1945 through 1949, identical bills were pending entitled, unfortunately but almost inevitably, "A bill to declare a national policy for determining invention." Now I have just said that the problem was not really to determine "invention," but to determine the *patentability* of inventions and this matter of language is one of major concern. Kettering got a hold on the distinction, but it keeps fading away like Alice's cat.

People don't think so much as they talk; and when they do think, they tend to think in words, at least about legal abstractions. Words are used to describe things, concepts, and experiences we have in common so that we can communicate. This thing, this concept, this experience every patent examiner, lawyer, and judge had come up against in practice was called the "requirement of invention," or just "invention"—the undefinable something or other that has to be there. This proves to be a cliché, meaningless though it is, that is hard to break away from. I taught for many years, and presumably my students learned, that the prerequisites to patentability were novelty, utility, and invention. There was nothing else to teach. Thinking and its concomitant words had not progressed beyond that point in the '30s and '40s. But today they have. Any current

[17] Report of National Patent Planning Comm., June 18, 1943, H. Doc. 239, 78th Cong., pp. 6, 10.

textbook and most cases, you will find, use the old terminology. But it isn't true any more and hasn't been for eleven and a half years—in my opinion, that is.

My not believing in ghosts or angels doesn't mean, *in law,* that there are no ghosts or angels, because if you think there are, and are frightened or informed by them, then they exist. As long as judges say there is a requirement for "invention," and many still do, then there is one. If you take a patent into court and the judge invalidates it for want of "invention" you *know* there is one. But why am I saying there is none? Am I talking theory or law; if law, then what kind of law? Or am I talking nonsense?

The outcome of those bills to determine invention, and one or two other bills, was that Congress got interested in revising and codifying the patent law and did so.[17a] In the new law (Title 35 U.S.C.) is a section, 103, described at the time by those who wrote it, at least in one place, as "incorporating a requirement for invention."[18] It was also described more carefully and accurately elsewhere[19] as providing a "*condition* which exists in our law and has existed for more than 100 years * * * by reason of decisions of the courts." (My emphasis.) And that "condition" is described in the title of this new section 103 as one for the existence of "non-obvious subject matter." The addition of section 103 was stated in the House Report on the bill[20] to be *one of the two major changes or innovations in the statute.*

[17a] See Giles S. Rich, "Congressional Intent—Or, Who Wrote the Patent Act of 1952?", in *Patent Procurement and Exploitation,* BNA 1963, pp. 61-78.

[18] House Report No. 1923, 82nd Cong., 2nd Sess., to accompany H.R. 7794, p. 5.

[19] *Id.* p. 7.

[20] *Id.* p. 5.

Appendix A

What section 103 itself says is that what is patented must *not* have been *obvious* to one of *ordinary* skill in *the art involved,* at the *time* the invention was made. The parallel with what would be expected of the "ordinary mechanic acquainted with the business" in the "doorknob case" should be clear.

This is not a "standard of invention"; and it is not called a "requirement of invention." The presence or absence of "invention" is not mentioned. The use of the term "invention" was, in fact, carefully avoided with a view to making a fresh start, free of all the divergent court opinions and rhetorical pronouncements about "inventions."[21] And in doing that it was contemplated, as the House Report states,[22] that "This section should have a stabilizing effect and minimize great departures which have appeared in some cases."

As has been pointed out by one of the drafters of that section, Mr. Federico, in his Commentary,[23] what section 103 was gunning for was

"* * * some modification * * * in the direction of moderating the extreme degrees of strictness exhibited in a number of judicial opinions over the past dozen or so years; that is, that some change of attitude more favorable to patents is hoped for. This is indicated by the language used in section 103 as well as by the general tenor of remarks of the Committees in the reports and particular comments."

The real vice or inadequacy of the judge-made requirement for "invention" was in the truism Mr. Federico also restated, "the so-called standard of invention * * * is

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[21] The writer speaks from personal knowledge as one of the drafters.

[22] Note 18, at p. 7.

[23] "Commentary on the New Patent Act," by P. J. Federico, 1954, published in Vol. 1 of 35 U.S.C.A.

an unmeasurable quantity having different meanings for different persons." It left every judge practically scott-free to decide this often controlling factor according to his personal philosophy of what inventions should be patented, whether or not he had any competence to do so or any knowledge of the patent system as an operative socioeconomic force. This was too great a freedom because it involves national policy which should be declared by Congress, not by individual judges or even groups of judges on multiple-judge courts. In section 103 Congress made such a policy declaration. It did not there declare what should constitute "invention." It was a statement of something to take place of this vague concept. And it was made in the face of judicial declarations, made in the *absence* of a statute, which Congress expressly desired to modify.

I would like to inject a new term into the language so we can discuss the matter rationally. I would like to call it the THIRD REQUIREMENT of patentability. The statute sets out all the requirements in the clearest possible form. Section 101 says inventions must be *new* and *useful,* requirements one and two; section 102 defines novelty; and section 103 lays down the *third requirement.* I repeat its clear-cut title: *"Conditions for patentability; non-obvious subject matter."*

Upon examination in the Patent Office or upon adjudication in court, under the statute, when novelty, utility, and unobviousness as defined in section 103 are found to exist, there is *patentability* and *that is the end of the matter.* An examination for the presence or absence of "invention," or of precedents on that muddy issue, is not called for and is not proper. It is a work of supererogation. It illustrates, furthermore, a failure to grasp the meaning of the statutory provisions. There is no such prerequisite in the statutory law.

Appendix A

When, as is the case with the "requirement for invention," the century's accumulation of judicial precedents range from A to Z and Congress, looking at the situation under the guiding light of Kettering's statement that *this is no yardstick and the greatest technical weakness of the patent system,* determines to make a yardstick and says the measure shall be "M", right in the middle of the alphabet, it behooves everyone concerned with administering that law to follow the measure "M" and to stop flitting about arbitrarily from A to Z, lighting upon that letter which seems most appealing.

But what do we have today? A host of lawyers, examiners and judges all doing their level best to follow the law as Congress wrote it? Anything but that! What we have today is a mish-mash, and that is a nice old English term, older than the 1624 Statute of Monopolies. Why do we have a mish-mash?

First, a century of thinking and writing about a phenomenon in one set of nomenclature is a hard thing to overcome. Also a lot of people go on administering the patent laws and practicing under them without bothering to read the revision of them, so they are not aware that there has been a change.

Second, by hindsight it is apparent that those most intimately concerned with the writing and expounding of the new patent act in 1952, themselves brought up in the "requirement for invention" tradition (and I speak as one of them) did a very poor job of informing the public what it was they had done. One reason for that was that, on the average, their own comprehension of what they had done was not too clear. Remember, they were all of the school that "invention" *could not* be defined and there they were, trying to put a provision on that very subject into the statute. In going as far as seemed to be possible in that direction, they knew they were not making a *definition* but rather a *statement of policy,* a *specific required*

approach to a difficult problem, which approach they thought would stop some of the nonsense derogatory of the patent system that had been going on. In pursuit of that objective, the drafters and Congress did one thing, by way of a statement of policy to counteract a judicial trend, which has had a clear-cut effect. Following a phrase casually dropped by the Supreme Court in *Cuno* v. *Automatic,*[24] in 1941, that "the new device, however useful it may be, must reveal the flash of creative genius," some courts took off on a quest for such a flash and, not finding it, invalidated patents. The last sentence of section 103 stopped this abruptly with the legislative command: "Patentability shall not be negatived by the manner in which the invention was made." But the judicial reaction to the first sentence,[25] in contrast, got to be all fouled up.

Third, the members of the bar have a lot to answer for in creating and perpetuating the mish-mash because it is they who, desiring to make use of some of the extreme cases antedating the patent act to invalidate patents in litigation, played down section 103 and early in its life persuaded a number of courts that it made no change whatever but was "mere codification."[25a] They are now

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[24] The Cuno Engineering Corp. v. The Automatic Devices Corp., 314 U.S. 84, 51 *USPQ* 272 (1941).

[25] § 103. *Conditions for patentability; non-obvious subject matter*

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

[25a] A little reflection should show that when judicial precedents constituting the "law" range from the very liberal to the most strict, it is a patent absurdity to speak of a statute taking a middle ground as a "codification" of existing law. See note 17a, *supra.*

paying more attention to section 103 as they learn that it can help them when they are on the other side, but they are learning slowly and my generation of lawyers, at least, is still talking, out of habit, in terms of "invention." Just listen to them!

Find me a trial lawyer for an infringer who will not urge on the court, as the existing test for "invention," the views expressed by the Justices of the Supreme Court in *A & P* v. *Supermarket*, in 1950,[26] two years before the effective date of section 103, and I will joyfully transfer my Kettering Award to him. He would deserve it more than I do. I have no clients. Herein lies a grave defect in the development of sound law through adversary proceedings.

Fourth, in the legislature the mish-mash has been described in detail, up to 1957 (the first 5 years of the act) in Senate Committee Study No. 7. What is its title? "Efforts to Establish a Statutory Standard of Invention."[27] The Senate Patent Subcommittee is still striving to bring about a higher degree of uniformity in the courts, in the various groups of the Patent Office, and between the two organizations, but in what terms does it do its own thinking? The subcommittee's annual Report (No. 107), April 3, 1963, is concerned about the "Patent Office 'standard of invention'" and refers to the development by that office of a "policy statement pertaining to standards of invention." The report for the next year (No. 1018), May 1, 1964, again refers to the need to eliminate differences within the Patent Office and between it and the courts "concerning the standard of invention." Meanwhile, ap-

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[26] *Supra*, n. 15, 340 U.S. 147. This was a case preeminently in the minds of the drafters of the 1952 Patent Act, having been decided during the writing of the first drafts. See note 17a.

[27] Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, U. S. Senate, 85th Cong., 1st Sess., pursuant to S. Res. 95, Study No. 7 (1958).

parently without the committee's knowledge, the Patent Office Academy has been teaching that there is no "standard of invention," that "invention" is meaningless, and that the prerequisite is as stated in section 103. Might it not do some good and help to achieve the uniformity the subcommittee so much desires if its own members, and staff, could convince themselves, in spite of what uninformed judges have said, that the 1952 Patent Act was intended by their fellow legislators to *replace* the "standard of invention," which never was a standard, with a requirement of unobviousness to a particular kind of person at a particular time?

Amid the confusion, there are some encouraging signs in the courts. During the first few years after the 1952 act, many courts took the position that Congress really had done *nothing* in enacting section 103 and went about their old business of looking for "invention." Then in 1955 came Judge Learned Hand's *Lyon* v. *Bausch & Lomb*[28] opinion and in 1960 his *Reiner* v. *I. Leon*[29] opinion, both of which realistically appraised and appreciated what section 103 had done, namely, to restore the law to what it had been 20 or 30 years earlier and, as he said, "to change the slow but steady drift of judicial decision that had been hostile to patents * * *." In the former opinion he remarked that " 'invention' became perhaps the most baffling concept in the whole catalogue of judicial efforts to provide postulates for indefinitely varying occasions." In the latter he said "It is not for us [the judiciary] to decide what 'discoveries' shall 'promote the progress of science and the useful arts' sufficiently to grant any 'exclusive right' of [to?] inventors. Nor may we approach the

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[28] Lyon v. Bausch & Lomb Optical Co., 224 F. 2d 530, 106 *USPQ* 1 (2d Cir. 1955).

[29] Reiner et al. v. I. Leon Co., 285 F. 2d 501, 128 *USPQ* 25 (2d Cir. 1960).

interpretation of § 103 * * * with a predetermined bias." While saying "The test laid down [in 103] is indeed misty e. ugh," he was able, with the evidence provided, to follow it. Certiorari was denied in both of these cases. In both cases the patents were sustained. The Supreme Court could easily have upset him had it wanted to. In fact, Judge Hand remarked to me and others at that Senate hearing in 1955[30] "Oh, they must take it," referring to *Bausch & Lomb.* Later during the hearing he testified,[31] "whether we were right in construing it [§ 103] as meaning that the old rules were to apply, remains to be seen. I hope the case will go up." From the viewpoint of the writers of the law, he was very right!

Last April (1964) the Fourth Circuit Court of Appeals in *Marvel* v. *Bell*,[32] which in 1954 said 103 merely codified the law, came to the conclusion, after reading a number of cases which "have undertaken to comprehensively set forth the standard of invention to be used as a test," that

"When the mass of verbiage has been distilled, however, we have little more to guide us than the test which is incorporated in section 103 * * *," and when in search of the "objective criteria of [un]obviousness." Perhaps, next time, that court will take the final step and *start* with the statute, ignoring the "mass of verbiage" it replaces. It seems a logical place to start, especially since it was intended to displace some of those cases in which the verbiage appears.

Last May (1964) the Sixth Circuit Court of Appeals, in *Monroe Auto Equipment Co.* v. *Heckethorn Mfg. Co.*,[33] said, "It is virtually a practical impossibility to define ade-

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[30] *Supra*, n. 12.

[31] *Id.* p. 120.

[32] 330 F. 2d 164, 141 *USPQ* 269.

[33] 141 *USPQ* 553.

quately that abstraction which we call invention,"[34] and then, in spite of that difficulty, said "we must have objective references and a place from which to start. For this we turn to the statute * * * § 103." A very good place to start! But then the court came to a very unnecessary conclusion "that invention is synonymous with unobviousness. Thus to say that a device lacks invention and that it is obvious is to state that the same legal proposition in two ways."[35] It concluded that while obviousness "does not begin to solve the problem," it "gives us a touchstone for the contextual meaning of invention." It also concluded that in a patent case decision is arrived at by three steps: a determination of what the prior art was, what the pat-

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[34] The full quotation is (141 *USPQ* at 553):

> It is virtually a practical impossibility to define adequately that abstraction which we call invention. Long ago the Supreme Court said: "The truth is the word cannot be defined in such a manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. In a given case we may be able to say that there is invention of a very high order. In another we can see that there is lacking that impalpable something which distinguishes invention from simple mechanical skill." McClain v. Ortmayer, 141 U.S. 419, 427 [Nov. 2, 1891]. This court consistently has echoed this view. [Cases cited.]

[35] A case was cited for this proposition, in re Jacoby, Jr., 309 F. 2d 513, 135 *USPQ* 317, 50 *CCPA* 734, in which the opinion was written by the present author. The Patent Office Board of Appeals had said the claimed invention "must be unobvious and involve invention." In a footnote to a reluctant but needed quotation of that statement the writer said:

> To add to the statement that it must be unobvious, as required by 35 U.S.C. 103, the further statement that it must "involve invention" is merely to state the same legal proposition in two different ways. It would seem to suffice to state it once, and that, preferably, in the words of the statute.

It should be clear that this was intended to put the proposition, developed more forcefully in the present paper, as gently as possible and that it was *not* intended to suggest that "invention" and "unobviousness" as provided in section 103 are alternative *equivalents* for determining patentability, which they are not.

entee has made, and whether it would have been obvious, viewing the prior art from the time just prior to when the patented device was made. That is just what section 103 says! It is beginning to take hold and the next step will be to realize, what should be so clear, that when the unobviousness question has been determined, there is nothing more to do and the question of "invention" can be forgotten.[36]

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[36] Along with it can be forgotten the "complexities" of another issue wrestled with by the court in deciding whether "unobviousness" is a question of law or fact. Compare Armour & Co. v. Wilson & Co., 274 F. 2d 143, 124 *USPQ* 115 (7th Cir. 1960). The presence or absence of "invention" before 1953 was always, in my judgment, the determination of an issue of public policy—what inventions *should* be patented. As such it is a "question of law." This policy has now been legislatively expressed in section 103. In that section (note 25, *supra*) the following potential issues of fact appear: (1) What are the *differences* between "the invention" and "the prior art"? (2) What is disclosed by the prior art presumed to have been available to the inventor? (3) What was the level of ordinary skill in the art at the time the invention was made? (4) Other fact issues relating to *circumstances* indicative of the presence or absence of obviousness, traditionally taken into account in determining "invention," such as long-felt need, immediate copying, sudden displacement of existing practices or devices, difficulty of achievement, failure of others, etc. Once these *facts* have been assembled, there remains the ultimate statutory requirement of unobviousness, the third requirement for patentability, which becomes a matter of statutory *application* and as such must be a question of law. As the court concluded in the *Armour & Co.* case, *supra*, "The development of the factual content necessary to statutory construction is a question of fact." It may be *several* such questions, however. As the court did *not* conclude in *Armour & Co.*, after the fact issues are settled, the determination of unobviousness is necessarily a legal conclusion arising out of the facts, pursuant to the statute—a question of law.

The *Armour* case concluded (1960), in the separate opinion devoted to the fact or law question, that after the facts were settled, "We examine the *standard of invention* applied to these facts as a question of law." (My emphasis.) But under section 103 there is no "standard of invention." The directive of the statute is to determine whether the invention "would have been obvious" on the basis of the *differences*, the *ordinary* skill, and as of the *time* of invention. *These* are the factors, and these alone, by which courts are to determine the existence of the third requirement. Leastwise, that is what the statute provides.

I cite these as straws in the wind. A study in the *Columbia Law Review* in 1963[37] concludes that "nothing indicates that the courts are moving toward a common interpretation of the statute." I am not so sure. I say give them time. They are stirring like live cocoons. We have only had this statute for a dozen years and the judges who have been there that long, as many of them have, are still indoctrinated with the old "standard of invention" terminology they learned from the old patent lawyers and the old textbooks. There will be new editions of all three in due course.

I might mention the Court of Customs and Patent Appeals which has been turning out a consistent stream of opinions, for at least the eight consecutive years of which I have personal knowledge, strictly applying the obviousness formula of section 103 to determine *patentability*, not the presence of invention, and slowly but surely warping the Patent Office into basing its actions on the statute. The results are beginning to show in the actions and board opinions we review. I believe we have invaded the Patent Office Academy. The Solicitor's office writes its briefs in the language of the statute.

Assistant Secretary of Commerce Hollomon made a speech in New York in March, 1964, in which he is reported to have said that he "believes that the courts and the Patent Office should both follow the same standard of *patentability.*" This would be nice but is obviously impossible until one or the other of them decides to standardize. A good place to begin would be the Patent Office, a lot easier than in the courts. Dr. Hollomon further said "that a standard of *patentability* should be more definitely set forth." He is to be complimented on his terminology, in not talking about a "standard of invention," but I think

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[37] "The Standard of Patentability—Judicial Interpretation of Section 103 of the Patent Act," 63 *Col. L. Rev.* 306-325 (Feb. 1963).

we should experiment with *using* the section 103 standard before we try to create another one. I find it very workable. It was a harder job to get it than he may imagine and in twelve years no better one has been proposed. The "criteria which may be worked out," referred to in the Revision Note to section 103, have never materialized. I doubt they ever will.

I have had two practical suggestions in the back of my mind for some time. One is to have sort of wallpaper border printed up to run around all the patent examiner's rooms on which the words NEW USEFUL UNOBVIOUS PATENTABLE are repeated endlessly. This could be designed into the new Patent Office building. Most inscriptions on the present Patent Office are not very useful. They might put on the Constitutional clause so people could see it contains no *standard* for determining patentability.

The other suggestion—and this one is more serious—is based on the discovery that lecture courses are given for new and other Federal judges from time to time on how to be a judge, printed in books and given to the judges, compliments of the West Publishing Company. This Institute or some other disinterested party or organization should prepare a lecture on the basic elements of patent law in up-to-date terminology as used in Title 35 U.S.C. and see to it that the Federal judges get it. Even a glossary would help, in which it would appear that the "requirement for invention" became obsolete in 1953 by an act of Congress, along with many prior court opinions discussing it, being replaced by unobviouness as defined in 103 as the THIRD REQUIREMENT FOR PATENTABILITY. By limiting the lecture to the terms of the statute and their clear meanings I do not see how the bar could object and many judges would be grateful.

I was recently discussing this subject with a young patent lawyer, urging that we should all stop talking about the

"standard of invention." She said, "What difference does it make?" That is a fair question which has to be answered, and with my present answers I will end:

The differences it will make—the reasons why we *must* learn to make this change—are these, among others:

—Until we stop talking about a "requirement for invention," it will never be clear that THE THIRD REQUIREMENT is that stated in section 103 *and no other;* that when 103 has been complied with, there is no further and different requirement called "invention"; that compliance with 103 is the policy judgment of Congress on how to bring the invention within the Constitutional purpose.

—Because looking for the presence of "invention" in addition to compliance with 103 defeats the legislative purpose.

—Because talking about both unobviousness and "invention" as different things leads to weird and confused thinking.

—Because testing patentability by the presence of "invention" gives judges and the Patent Office too much freedom to decide patentability of new and useful inventions on the basis of a personal view as to what *should* be patentable, instead of accepting the view of the legislature on that question of national policy.

—Because it will get all those concerned with the administration of the patent system—Patent Office, Courts, and the bar—speaking the same language, a sine qua non to the communication of intelligence.

—Because you cannot use "invention" as both an abstract noun and a concrete noun in the same statute or opinion without confusion. The invention is the thing that has been produced by the "inventor." There will be muddy thought as long as one has to say: this invention (in the concrete sense) is unpatentable because it is not an invention (in the abstract sense).

—Because it will do more than anything else I can think of to bring about that long-sought-for greater uniformity of opinion on patentability.

—Because it makes the prerequisites to patentability intelligible.

As I hope I have been.

To quote Learned Hand—that well-named judge—once more, maybe I am only "shovelling smoke." Time alone will tell.

(Applause)